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No. 10-482

Supreme Court, U.S.
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In The

Supreme Court of the United States

DANIEL SHERMAN,

Petitioner,

v.

WILLIAM LAMOTHE, RAJAN SOBHANI, CHRIS BRACK, DANIEL ESTRADA, SCOTT STUDEBAKER, JAMES MICHAEL WALSH, BRANDON ROBINSON, and PATRICK STRAYER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a circuit court acts inconsistently with this Court's decision in *Lehman Bros. v. Schein,* 416 U.S. 386 (1974), or otherwise commits error, by deciding a state-law question without certifying that question to the state's supreme court where –

- the question presented is of no importance to the state's jurisprudence,
- there is no authority – old or new – from any state court for the proposed extension of long-settled state law to the petitioner's case,
- the proposed rule of law is so absurd that the three federal courts to address each chose different reasons – all of them sound – on which to consign it to a justly-deserved perdition, and
- the federal court rejected the proposed rule of law on the basis of the unvarying practice of the courts of Texas consonant with the principle of *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938).

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STATEMENT OF THE CASE

Mr. Sherman, a bankruptcy trustee, commenced an adversary proceeding in bankruptcy court against former employees of the debtor, Velocita Worldwide Logistics, Inc. A year and a half prior to Velocita's filing bankruptcy, Velocita and the employees, who are the Respondents to Mr. Sherman's petition, signed a 37-page agreement to settle a bitter, crippling lawsuit brought by a competitor. One paragraph of the Settlement Agreement required the payment of $1.85 million to the competitor. All the funds for that payment came from the liquidation of some of Velocita's assets. The premise of Mr. Sherman's lawsuit against the Respondents – and originally, curiously enough, against Velocita itself, Velocita having been dropped on appeal – was that Texas law implied a right of contribution from the Settlement Agreement that they signed, requiring each of them to pay his *pro rata* share of the $1.85 million. The bankruptcy court and the district court of the Northern District of Texas and the Fifth Circuit Court of Appeals have all found that the Texas law is clear and does not permit such an implication. Mr. Sherman now asks this Court to review an issue of Texas state law.

FACTS OF THE UNDERLYING LITIGATION

Velocita Worldwide Logistics, Inc., opened for business in 2003 and went out of business in June of

2004 because of the huge litigation costs in a suit brought by a competitor, Excel Global Logistics, Inc. That lawsuit was settled in May of 2004 in a settlement agreement that was 37 pages long, and which the 192nd Judicial District Court of Dallas County entered as an Agreed Final Judgment and Permanent Injunction on June 3, 2004. BR0041-69 (without exhibits); BR0237-275(with exhibits) (the "Agreement").[1] It is this Agreement out of which Mr. Sherman contends a right to contribution should be implied under Texas law.

Mr. Sherman would like to style the Agreement as a settlement which was solely a matter of paying money to settle claims. It is hardly that, as even the most cursory reading reveals. One does not need 37 pages of court order to settle a lawsuit for cash. The payment of cash is handled in a single paragraph, paragraph U on page 19 of the Agreement. BR0059; 0255. The vast bulk of the Agreement is given over to injunctions, most of them directed against Velocita: paragraphs A (extending over six pages), B, C, E, F, R, S, U, V, W, X, AA, FF and GG. BR0043-0050; 0057-0064; 0238-0246; 0255-0260. The Agreement required Velocita on or before June 4, 2004, to terminate its employees, to dispose of its assets, and to cease all activities except for the collection of receivables and payment of creditors. Paragraphs E and F,

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[1] The abbreviation "BR" refers to the bankruptcy court record.

BR0049-0050; 0245-0246. There were, in addition, injunctions against each one of the individual defendants, restraining each of them from a variety of activities, each injunction tailored to the individual defendant enjoined. Each one of these enjoined individual defendants was substantially limited in the business he or she could transact over a period of years. There were also affirmative obligations, such as assisting in pending litigation, Paragraph S, BR0058; 0254, and revealing information about disloyal Exel employees and assisting in any litigation against those employees. Paragraph T, BR0058-0059; 0254-0255.

While the Agreement settled the lawsuit, it did not end the employees' potential liability to Exel since it reserved Exel's right in the case of certain violations of the Agreement, not only to file the agreed judgments attached as Exhibits L, M and N, automatically imposing stipulated damages in amounts of $100,000, $10,000 and $250,000, respectively, but also to consider each such violation a "contempt of court, subject to fines, penalties, damages and costs, including attorney's fees . . . [and] an appropriate monetary judgment." Paragraph AA, BR0061-0062; 0257-0258.

Not only is there no provision in the Agreement for any contribution among the various defendants who signed it; contribution is expressly barred by the Agreement on pages 2-3:

> This Agreed Judgment **resolves all matters between the parties**, past or present, known

> or unknown, including but not limited to matters related to Civil Action No. 03-11467-K pending before the District Court of Dallas County, 192nd Judicial District. [Emphasis added.]

BR0042-43; 0238-0239.

While the Agreement required Velocita to stop doing business, BR0049-0050; 0245-0246, it allowed Velocita to collect its receivables and pay its creditors. BR0061; 0257. In the ensuing six months, Velocita was able to collect about ninety percent of its receivables, BR0128, and pay $600,000 to its unsecured creditors. BR0171; 0234. A year and a half after closing down, in October of 2005, Velocita filed bankruptcy to stop the collection efforts of creditors who were unconvinced that Velocita had no assets. BR0126-0127. Proofs of claim totaling $250,000 were filed in the Velocita bankruptcy; Velocita had paid roughly seventy percent of its debts before filing for bankruptcy protection.

The only complete statement of the history of the events leading up to the execution of the Agreement is found in the declaration of respondent William LaMothe, filed on November 26, 2007, as Exhibit A to Defendants' Motion for Judgment on the Pleadings and to Dismiss for Failure to State a Cause of Action. BR0231-0235. It is wholly uncontradicted. It reads, in relevant part:

> 2. Skyteam, Inc., was incorporated on April 4, 2002. The corporation was intended

to be a holding company for certain assets, but that never came to pass, and it remained dormant until the summer of 2004. At that time, it began operating in the air freight forwarding business, and the name was later changed to Velocita Worldwide Logistics, Inc.

3. Air freight forwarding is a relatively simple business. Customers are businesses that need air freight shipping, frequently on an expedited basis. When the customer calls the air freight forwarder, stating the specifics of its need – how much is being shipped, what weight, what volume, how quickly it needs to arrive – then the air freight forwarder quotes a price and arranges not only for the air freight space on scheduled airline fights, but also for the ground transportation to and from the airport.

4. I have been in the freight forwarding business since 1990. I founded a company named Skyking Inc, which I sold in 1997 to a company that, a few years later was acquired by Exel, Inc. The name of my former company then became Exel North American Logistics, Inc. I entered into a five-year employment agreement as part of the acquisition. I completed my five years with Exel and then, my wife began to operate Velocita as an air freight forwarder. She hired me and several other former Skyking employees.

5. We used no trade secrets of Exel's. Any restrictions in my employment contract

had expired long before I went to work for Velocita. Nonetheless, Exel and Exel North American Logistics commenced a lawsuit against Velocita and its employees, alleging use of its trade secrets, violations of employment contracts and other matters. I have been involved in some litigation in my years in the freight forwarding business, but I have never been involved in anything as vicious or as malicious as this litigation. It was clear to me that the aim of the lawsuit was to put Velocita out of business, and my conclusion was confirmed during the mediation that led to the settlement with Exel. The claims that they made against Velocita and its employees were without merit. For example, they sued Rajan Sobhani for breaching his contract with Exel. He had left Exel over a year prior to coming to work for Velocita, and when he left Exel he had received a complete, written release from all restrictions contained in his employment contract.

6. The litigation was vicious and unprincipled and was carried on without concern for expense. I have come to understand that Exel spent three and a half million dollars in fees for lawyers and investigators. The lawyers representing us said that they had never seen such a "take-no-prisoners" litigation and that Baker Botts, the plaintiffs' firm, were litigating as if they had Fort Knox for a client. They also said that plaintiffs' counsel told them that the aim of the Exel was to squash Velocita and everyone

associated with it. Velocita itself paid over $400,000 in attorney's fees in this lawsuit and by the time of settlement the fees were being incurred at a six-figure monthly rate – all fees being paid by Velocita. Because of differing interests of the defendants, there were three different law firms involved in the defense, Kane Russell Coleman & Logan, Loewinsohn & Flegle, and Thompson & Knight, all of which participated in the mediation that produced the Settlement Agreement. During settlement discussions and during mediation Velocita's interests were always separately considered and were never ignored.

7. There came a point in the Spring of 2004 when Velocita's investors, who were approximately two million dollars in the hole, informed Velocita that they were unwilling to put further funds into either the corporation or the defense of the lawsuit. Although all of the defendants in that suit felt themselves to be innocent of any of the charges made against them, we had no alternative but to settle. There was no way that we could continue to operate the company and litigate the case simultaneously. The costs of the lawsuit were beyond what Velocita's income could support, and the all-encompassing nature of the lawsuit made it impossible for employees to concentrate on Velocita's business.

8. At that point, the parties commenced a mediation to settle the lawsuit.

The mediation went for three days and produced the settlement that is embodied in the final judgment of the lawsuit. Not only was the settlement negotiated at arm's length, it was negotiated with significant mutual hostility. The settlement was approved by the judge and entered as an order in the case.

9. The settlement amount of $1.85 million was based on the defendants' estimation of what it would cost to litigate the case to a full judgment. But the settlement was not simply a matter of money. Exel demanded that Velocita cease business and all of the defendants had injunctions entered against them. I was obliged to refrain from doing any [*sic*] anything in the freight forwarding business for two years. My loss in salary for that period was not less than one million dollars, not counting the year I worked for Velocita during which, because of the litigation, I received no salary whatsoever.

10. It was never the intent of the parties to the settlement to leave the creditors of Velocita unpaid. Velocita had receivables and, if enough of them were paid, Velocita's creditors could all be paid, perhaps at a rate of 100 cents on the dollar, perhaps less. Unfortunately the word got out that Velocita was closing its doors and a substantial number of its invoices were never paid. Nonetheless, over the six months after the settlement, Velocita collected enough receivables to pay roughly $600,000

> to its creditors in the six months after it closed down.

BR0170-0171; 0231-0234.

A statement of this case would be incomplete if it did not go through Mr. Sherman's manic gyrations as he attempted to find a theory to support his lawsuit. Mr. Sherman filed his original complaint on December 14, 2006, BR0193-201, but did not serve the Defendants until after he had filed his First Amended Complaint on October 2, 2007. BR0202-210. The First Amended Complaint contained somewhere around a dozen causes of action: in paragraph 14, violation of the Texas Theft Liability Act, breach of fiduciary duty, and conversion, BR0206; in paragraph 15, civil conspiracy, BR0206; in paragraph 16, breach of fiduciary duty (again), fraud and breach of contract, BR0206; in paragraph 17, turnover, BR0206-207; in paragraph 18, fraudulent transfer, BR0207; and in paragraph 19, joint tortious activity, contribution, indemnity and vicarious liability, BR0207.

On March 6, 2008, Mr. Sherman again amended his complaint, and his Second Amended Complaint, BR0018a-23, sought contribution or indemnity on two bases: first, arising out of an "implied contract or equitable contribution," Paragraph 13, BR0021, and second, because the defendants were "joint-tortfeasors." Paragraph 14, BR0022. Although he did not amend his complaint again, Mr. Sherman continued through the course of the litigation to shift his ground. In his reply brief in support of his motion for summary

judgment, for example, Mr. Sherman added a cause of action: he claimed that he was entitled to recover contribution for payment not only of a contract, but also of a judgment. Trustee's Reply, Paragraph 7, BR0180. And when he filed his motion for summary judgment, Mr. Sherman stated that since his cause of action was "not a tort case, none of the Texas statutory schemes apply," Plaintiff's Motion for Partial Summary Judgment Paragraph 9, BR0083, appearing thereby to have abandoned his claim to contribution from joint tortfeasors. It was never clear in the bankruptcy court which claims Mr. Sherman was still advocating and which he had abandoned. It was only in his appeal to the Fifth Circuit that Mr. Sherman finally settled on a single theory of recovery: an implied right of contribution arising from the Agreement. It is worth noting that Mr. Sherman never did any discovery on any of his claims.

The Respondents have repeatedly, at every level of this litigation, pointed out the practical effects of Mr. Sherman's theory of recovery:

> [Mr. Sherman's] argument that Velocita paid more than the other settling defendants and should therefore be able to pursue its former employees to get its money back runs contrary to common sense. When cases with multiple defendants settle, it is not in any wise unusual for the defendants to pay unequal shares of the settlement amount. The reasons for this are legion: differing perspectives on who is actually the more guilty party, differing abilities to come up with cash

for settlement, family ties, business ties, friendship; in practical terms, the list is endless.

. . . . Where there are multiple defendants paying, determining who is going to pay how much *always* is an issue. It is always settled one way or another among the defendants before any money is put on the table. It is rare that the division of financial responsibility appears in the agreement itself, but it is *always* the case that under the settlement agreement, all settling defendants are bound to pay the entire amount, irrespective of what their individual shares of that obligation may be under the agreement among themselves. The obvious reason for having all defendants sign off on the payment of the full sum is that since the plaintiff is releasing all defendants, he wants to bind all the defendants to pay. If the deep pocket doesn't pay – and typically by the time of settlement the plaintiff knows who has the cash – he can go after any or all of the settling parties. Even if an impecunious party cannot pay, whatever ties that party may have to the deep pocket that caused the [*sic*] him to agree to pony up in the first place can be used to make sure the money is forthcoming.

Under Mr. Sherman's view of the law, there is only one option: all defendants must pay equal shares. His brief is quite clear about this:

> apportioning liability under the contract is no more complicated than dividing the settlement amount by the number of settling parties.

Appellant's Brief at 18. That one-size fits-all solution would bring joy to the hearts of neither plaintiffs nor defendants. Procrustes, on the other hand, would be delighted.

> If what Mr. Sherman novel proposal [*sic*] were the law, it would mean that as soon as the Settlement Agreement was signed, Mr. LaMothe, who signed the agreement as President of Velocita, could turn to his fellow employees as they walked out of the mediation room and say: "By the way, since Velocita paid all the money, I'm going to sue you on behalf of Velocita for your *pro rata* share of the settlement payment." Having thereby reneged on the critical internal deal that made the settlement possible, Mr. LaMothe would be lucky to escape with his life.

> Nothing could be more destructive of the willingness of parties to settle cases than Mr. Sherman's rule of law. If his novel concept were the law, co-defendants settling cases would fear that the one who paid the lion's share of the cash might later suffer buyer's regret and put everybody back in the soup. And while they might personally trust the deep pocket defendant to stick to the deal, they would appropriately fear a bankruptcy filing which might produce a trustee as wrongheaded – dare one say as venal? – as

Mr. Sherman. The Rule in Sherman's Case would make every final settlement interlocutory, and litigants' fear that the very agreement they have crafted to end the pain of litigation might itself engender further lawsuits and would make settlements in cases with multiple defendants difficult if not impossible to consummate.

Mr. Sherman further argues:

> By signing the settlement agreement, a contract, the appellees became co-obligors with Velocita for payment of the $1.85 million.

Appellant's Brief at 16. But by signing the Settlement Agreement the employees also became co-obligors, if you will, on a vast number of other obligations. Since these other obligations were part of the price that they jointly paid to get off the hook in the Exel lawsuit, the employees should, by Mr. Sherman's logic, be obliged to reimburse each other for losses incurred in performing those other promises. For example, the only employee wholly forbidden to work in the freight forwarding industry was Mr. LaMothe; Exel was apparently as interested in putting him out of business as it was in putting Velocita itself out of business. Given the importance to Exel of handcuffing Mr. LaMothe, Mr. Sherman's logic argues that Mr. LaMothe should have a claim against the other employees to reimburse him for the million dollars in personal income he lost by

> honoring his promises set out in the Settlement Agreement. This is of course absurd – as is Mr. Sherman's whole cockeyed notion of contribution arising from a settlement agreement.

Respondents' Brief in the Fifth Circuit, pp. 13-16.

The Respondents believe that the Court's knowing these underlying facts and contentions will help it to determine whether to grant Mr. Sherman's petition.

REASONS FOR DENYING THE WRIT

At first glance, Mr. Sherman's Petition for Certiorari appears to present at least a marginally plausible case for the granting of the writ of certiorari. That, however, is only because Mr. Sherman, as in every other pleading filed in this case, has vastly oversimplified facts of the case, assiduously avoiding those inconvenient facts that undermine his arguments.

In over a hundred years of rulings in Texas courts on the right of contribution implied from contracts, the doctrine has only been applied to two types of contracts: surety agreements and guaranty agreements. Mr. Sherman has invited three federal courts to create new law for Texas. They have all declined to do so, for good and sufficient reasons.

PETITIONER'S QUESTION PRESENTED MISLEADS THE COURT

Perhaps the best place to begin is with Petitioner's question presented, which reads as follows:

> QUESTION PRESENTED
>
> The court of appeals decided this bankruptcy appeal by resolving on policy grounds what it deemed a question of first impression under Texas law, without certifying that question to the Texas Supreme Court. In doing so, the court disregarded two Texas Supreme Court decisions from the 1890's, apparently deeming them too old to be instructive. The question presented is:
>
> 1. Whether a circuit court acts inconsistently with this Court's decision in *Lehman Bros. v. Schein*, 416 U.S. 386 (1974), or otherwise commits error, by deciding a state-law question without certifying that question to the state's supreme court where –
>
> - the question presented is important to the state's jurisprudence,
> - there is authority – old but not overruled – from the state's supreme court resolving the question contrary to the federal court's resolution of it,
> - the question is difficult enough that the three federal courts to address it all resolve it on different theories and grounds, and

- the federal court decides the issue on policy grounds.

This question presented is an exercise in utter fantasy. Not one of the four bullet points is even close to being the truth. Let us go through it point by point.

First Untruth: The Question Presented Is Important to the State's Jurisprudence

No litigant in those over 100 years has ever had the temerity even to raise the issue. Thus to say that this issue is important to Texas jurisprudence goes far beyond hyperbole into the category of flat blowin' smoke. The legal issue may be of importance to Mr. Sherman, but it is not even so much as a gnat on the hindquarters of the rhinoceros that is the law of Texas.

Second Untruth: There Is Authority – Old but Not Overruled – from the State's Supreme Court Resolving the Question Contrary to the Federal Court's Resolution of It

To claim that there is Texas Supreme Court authority to the contrary is utter poppycock. Neither party and no court was able to find a single case where the right of contribution was implied from any contract other than a surety or guaranty agreement.

It was on this complete lack of authority that the Fifth Circuit decided the case.

The Fifth Circuit reasoned as follows:

> Texas courts have long allowed actions for contribution in guaranty and surety cases even where the right was not set out in the note or contract. Occasionally, Texas courts have recognized the right to contribution in language broad enough to be construed to cover the situation here. . . .
>
> * * *
>
> Notwithstanding the broad language quoted above, Texas courts, to the best of our knowledge, have not found occasion to extend the contribution right implied in guaranty and surety agreements to other types of contracts.

Sherman v. LaMothe, 608 F.3d 212, 214-215 (5th Cir. 2010).

That is an accurate statement of the law on an implied right of contribution in Texas. The implied right is not a recent innovation of Texas law; it has been in place for over a century, probably closer to a century and a half. As the Fifth Circuit noted, in all that time, the doctrine has never been applied to any contracts except sureties and guaranties. Since no research, whether research by a party or by a court has unearthed *any* case that has extended the doctrine beyond those categories, it is a solid inference that the settled law of Texas is that there is an

implied right of contribution *only* in surety and guaranty contracts. The agreement in this case is neither a guaranty nor a surety. To extend the implied right of contribution to a settlement agreement would create new Texas law.

The Fifth Circuit pointed out that this extension of the implied right of contribution to a settlement agreement would be a radical change in the law because of the substantial differences between a surety or guaranty agreement and a settlement agreement:

> The factors that justify the contribution right implied in sureties and guaranties are absent here. First, the subject matter of the settlement agreement involved more than money. Although a $1.85 million payment constituted one part of the agreement, the remainder comprised individually tailored injunctions against the Employees and Velocita. Texas courts have recognized that the general rule of an equally divided pro rata contribution is altered when, for example, co-obligors shared unequally in the consideration received out of the note, in which case "contribution may be prorated according to the benefits each received." *Dittberner v. Bell*, 558 S.W.2d 527, 534 (Tex. Civ. App. 1977). In this case, the benefits that the individual Employees received from being released from the suit were presumably not equal. Some Employees must have been less involved in the actions that Exel alleged were trade secret violations. The individually

> tailored injunctions support this contention: LaMothe, for example, faced an injunction that was notably more strict than that faced by the other Employees. Thus, contrary to the Trustee's arguments, implying a right to contribution would necessarily force the district court to open up the underlying settlement to determine an equitable division among the Employees.

698 F.3d at 215-216 (Footnote omitted).

The sole authority on which Mr. Sherman relies is one phrase in one case, *Faires v. Cockrill*, 88 Tex. 428, 31 S.W. 639 (1895), a phrase his brief emphasizes in the following quotation from *Faires*: that "the right [to contribution] applies to promises 'to pay a sum of money, ***or to do something for***' another party. *Faires v. Cockrill*, 31 S.W. 190, 193 (Tex. 1895)" Petition at 13 (Italics and boldface added by Mr. Sherman). The quoted language, however, is part of a long, irrelevant section on subrogation – irrelevant because the issue before the court was *not* whether there was a right to contribution, but what statute of limitations applied to the Plaintiffs' action. The court frankly owned up to its judicial self-indulgence, stating that

> [t]hese cases do not bear directly upon the question under consideration, but we cite them to show that our decisions recognize

> the doctrine of subrogation to its fullest extent.

Faires, 88 Tex. at 437. The court did not hold that the contract in that case was one from which a right of contribution could be implied.

The question remains, however: what kind of a contract *was* it that *Faires* was dealing with? One cannot tell from *Faires* itself. *Faires* is a typical nineteenth century American legal opinion, rambling on law and opaque on facts. A later lower court opinion, however, tells us precisely what kind of a contract it was: a plain-vanilla guaranty. *Faires* remanded the case, and after a retrial there was a second appeal, reported as *Mateer v. Cockrill*, 18 Tex. Civ. App. 391 (1898). *Mateer* makes clear that the contract *Faires* dealt with was a guaranty. 18 Tex. Civ. App. at 394 ("*guarantee* contract;" "paid on the bonus *guaranteed*;" "*co-obligors on the guarantee* given the company;" plaintiffs "dismissed as to all who did not sign the *guarantee*;" "The petitioners prayed for judgment for each of them, as against the defendants, who were their *co-obligors on the guaranty*"); 396 ("implied promise of the *guarantors*"); 398 ("*guarantors*"). Neither *Faires* nor *Mateer* in any way deviates from the principle enunciated by the Fifth Circuit: that in Texas, a right to contribution is implied only from surety and guaranty agreements.

Third Untruth: The Question Is Difficult Enough That the Three Federal Courts to Address it All Resolve it on Different Theories and Grounds

Give us a break. It is true that each of the courts that looked at this case had a different rationale for justifiably consigning this case to the rubbish heap of judicial history. But that is not because of any judicial confusion; it is a reflection of the fact that there are myriad reasons why this cockeyed case is utterly without merit. This case is like giving Josh Hamilton[2] a fat pitch in the center of the strike zone; he has to think: right field, left field, or center field; but there is never any question but that that ball is gone.

None of the grounds on which the lower courts dismissed and affirmed the dismissal is wrong; they are all sound choices among the many rationales on which the case could be dismissed.

Bankruptcy Judge Harlin "Cooter" Hale was right when he ruled as follows:

> With respect to the right of contribution, under Texas law, a judgment entered under a settlement agreement does not provide a basis in law or in equity for a subsequent

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[2] Kind of a hero down here in Texas. Plays baseball, you know. Pretty well, too. Albeit perhaps not quite well enough in the past few games.

> contribution claim. *Beech Aircraft Corp. v. Jinkins*, 739 S.W.2d 19, 21 (Tex. 1987). Therefore, a right of contribution does not arise out of the agreed order entered into under the settlement agreement between the Plaintiff and Defendants in this case.

That is the law in Texas, under a long string of cases in the last quarter of the twentieth century dealing with common-law rights to contribution.

And District Judge Ed Kinkeade was right when he ruled:

> Because there is no statutory right of contribution among settling defendants and no such provision was written into the contract, Appellant would have the Court imply one in the contract.
>
> * * *
>
> Texas public policy favors settlements to effectuate the efficient administration of justice. *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992). Appellant would have the Court open up a state court's agreed judgment, signed on May 25, 2004, in an ultimately futile attempt to determine the pro rata liability of ten individual defendants. Such an action would frustrate Texas public policy of encouraging settlement. Settling tortfeasors may agree among themselves as to their respective responsibility for a plaintiff's damages . . . rather than ask a court five years later to do the work for them.

There is no misstatement of law in either opinion, nor did the Fifth Circuit so rule. The Fifth Circuit simply chose to focus on another of the defects in Mr. Sherman's misbegotten lawsuit in affirming its dismissal.

Fourth Untruth: The Federal Court Decides [*sic*] the Issue on Policy Grounds

The Fifth Circuit decided this case by ruling that in Texas the law is clear: the implied right of contribution is limited to surety and guaranty contracts. There was, indeed, a policy reason underlying that decision: the policy that federal courts should not make new law for the states, that federal courts are to follow, not create state law precedent. This policy has been at the heart of federal court jurisprudence since *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938). It is still sound policy.

There is one particularly telling comment towards the end of the Fifth Circuit's opinion:

> Additionally, nothing indicates that contribution would accord with the expectations of the Employees and Velocita. Allowing contribution would imply an eleven-way promise that the Employees and Velocita would almost surely not have made in the circumstances of this case. The Trustee has not pointed to anything in the record indicating that, *ex ante*, the Employees contemplated

> an arrangement at all analogous to a guaranty.

698 F.3d at 216. All three of the judges on the Fifth Circuit panel have had long experience in private practice – the law practice of two of the three having been in Texas – and on lower courts; that experience has given each of them a keen practical sense of how lawsuits are settled. Why did they include this aside? One guesses that, perceiving a need, they wanted to educate Mr. Sherman.

THE FIFTH CIRCUIT'S DECISION IS IN NO WAY INCONSISTENT WITH *LEHMAN BROS. V. SCHEIN*

Petitioner contends the Fifth Circuit's ruling is inconsistent with *Lehman Bros. v. Schein,* 416 U.S. 386 (1974). Nothing could be further from the truth.

In *Lehman*, the issue before the Second Circuit Court of Appeals was the scope of corporate fiduciary duties in an insider trading case. The court determined that while Florida law applied, there was no decisive Florida precedent. It then turned to other states' law to establish what Florida courts "would probably" do. *Id.* at 389.

This case is wholly unlike *Lehman*. While the Second Circuit in *Lehman* ruled that there was no governing Florida precedent – and this Court agreed that there was "great unsettlement of law," *id.* at 390 the Fifth Circuit in this case determined that the

law of Texas is in fact settled: in over 100 years of rulings, the right of contribution has never been implied in any contract other than surety and guaranty contracts. While the Second Circuit in *Lehman* turned "to the law of other jurisdictions" to make its ruling, the Fifth Circuit committed no such apostasy.

The *Lehman* court was quick to point out that it did not suggest that even

> where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. . . . Its use in a given case rests in the sound discretion of the federal court.

Id. at 390-391. Mr. Sherman has given no legitimate basis on which to found any conclusion that the discretion of the Fifth Circuit was unsoundly exercised. In his petition he states that this court should grant his petition "to provide much-needed guidance on certification," Petition at 2, but does nothing to explain why such guidance is needed. In the Respondents' view, leaving certification to "the sound discretion of the federal court," as the *Lehman* court ruled, seems to say all that needs to be said.

There is another aspect to the exercise of this court's discretion in whether to grant certiorari in this case. In *Lehman*, Mr. Justice Douglas opined that use of the certification procedure

> does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism.

Id. at 391. In his concurrence, Mr. Justice Rehnquist pointed out that certification

> entails more delay and expense than would an ordinary decision of the state question on the merits by the federal court . . . additional time and money are required to achieve a [state law] determination.

and reviewed the extensive procedural requirements of certification to the Florida Supreme Court. *Id.* at 394-395. Those requirements are similar to the Texas rule governing certification, Rule 58 of the Texas Rules of Appellate Procedure, in the Appendix hereto. Certification to the Supreme Court of Texas would entail a new round of briefing, oral argument and expense, duplicative of what has already transpired in the Fifth Circuit.

Moreover, Mr. Sherman did not make a request for certification until the motion for rehearing in the Fifth Circuit, a motion that could have been made in either of the two lower courts. He argues that his lack of diligence should not be held against him because he "had no idea that the court of appeals would consider [his] cases unworthy of respect." By the time he got to the Fifth Circuit, Mr. Sherman had been shot down twice by judges who found his cases unworthy of respect. If he had "no idea" that bad things would happen in the Fifth Circuit, the Respondents would suggest that he is slow-witted beyond the tolerance of this Court. It would be something different if he had actually found a case – *any* case – extending the implied right of contribution

beyond sureties and guaranties. But he found no authority for his extension of the law, nor did the Respondents nor did any of the five judges who ruled on his case.

Mr. Sherman has had three bites at the apple before judges familiar with Texas law and has lost all three times. Enough already.

CONCLUSION

It beggars credibility that Mr. Sherman has the effrontery to contend there is an issue in his case worthy of this overworked Court's attention. This Court should deny his application for a writ of certiorari.

Respectfully submitted,

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TEXAS RULES OF APPELLATE PROCEDURE

Rule 58. Certification of Questions of Law by United States Courts

58.1. Certification

The Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent. The Supreme Court may decline to answer the questions certified to it.

58.2. Contents of the Certification Order

An order from the certifying court must set forth:

(a) the questions of law to be answered; and

(b) a stipulated statement of all facts relevant to the questions certified, showing fully the nature of the controversy in which the questions arose.

58.3. Transmission of Certification Order

The clerk of the certifying court must send to the clerk of the Supreme Court of Texas the following:

(a) the certification order under the certifying court's official seal;

(b) a list of the names of all parties to the pending case, giving the address and telephone number, if known, of any party not represented by counsel; and

(c) a list of the names, addresses, and telephone numbers of counsel for each party.

58.4. Transmission of Record

The certifying court should not send the Supreme Court of Texas the record in the pending case with the certification order. The Supreme Court may later require the original or copies of all or part of the record before the certifying court to be filed with the Supreme Court clerk.

58.5. Fees and Costs

Unless the certifying court orders otherwise in its certification order, the parties must bear equally the fees under Rule 5.

58.6. Notice

If the Supreme Court agrees to answer the questions certified to it, the Court will notify all parties and the certifying court. The Supreme Court clerk must also send a notice to the Attorney General of Texas if:

(a) the constitutionality of a Texas statute is the subject of a certified question that the Supreme Court has agreed to answer; and

(b) the State of Texas or an officer, agency, or employee of the state is not a party to the proceeding in the certifying court.

58.7. Briefs and Oral Argument

(a) *Briefs.* The appealing party in the certifying court must file a brief with the Supreme Court clerk within 30 days after the date of the notice. Opposing parties must file an answering brief within 20 days after receiving the opening brief. Briefs must comply with Rule 55 to the extent its provisions apply. On motion complying with Rule 10.5(b), either before or after the brief is due, the Supreme Court may extend the time to file a brief.

(b) *Oral Argument.* Oral argument may be granted either on a party's request or on the Court's own initiative. Argument is governed by Rule 59.

58.8. Intervention by the State

If the constitutionality of a Texas statute is the subject of a certified question that the Supreme Court has agreed to answer the State of Texas may intervene at any reasonable time for briefing and oral argument (if argument is allowed), on the question of constitutionality.

58.9. Opinion on Certified Questions

If the Supreme Court has agreed to answer a certified question, it will hand down an opinion as in any other case.

58.10. Answering Certified Questions

After all motions for rehearing have been overruled, the Supreme Court clerk must send to the certifying court the written opinion on the certified questions. The opinion must be under the Supreme Court's seal.